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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 481.

ROBERT H. LUCAS, Collector of Internal Revenue for the District of Kentucky, - - - - - Petitioner,

vs.

A. J. A. ALEXANDER, - - - - - - Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

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Of Counsel.

WESTERFIELD-BOOTS COMPANY, INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

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No. 481.

ROBERT H. LUCAS, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF KENTUCKY, - - - - - - - - *Petitioner,*

vs.

A. J. A. ALEXANDER, - - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

We did not have a copy of petitioner's brief at the time respondent's brief was written and desire to reply to two points raised, which were not originally covered.

I.

The Bankruptcy Act is not analogous to the Revenue Law and the fact that cash surrender value is the only amount passing to the trustee is not at all indicative that value under the Income Tax Law is no more than cash surrender.

Section 70 (a) of the Bankruptcy Act (Act of July 1, 1898, C. 541, 30 Stat. 544, 565) U. S. C. A. T. 11,

Section 110, specifically provides for the exclusion of life insurance policies on the payment of the cash surrender value to the trustee. Said section is as follows:

> "When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representative, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

Unlike the Bankruptcy Act, the Revenue Act does not specifically provide for taxing the proceeds of insurance policies, where the premiums are paid before March 1, 1913, and surrendered subsequently.

In our original brief, we did not take up valuation of insurance policies of bankrupts, because of the provisions peculiar to the Bankruptcy Act. However, the courts have said, in bankruptcy cases, in construing policies with postponed dividend features, that such were property rights and susceptible to valuation. *In re* Slingluff, 106 Fed. 154, the Court said:

> "The endowment feature is obviously in the nature of a savings fund, in which the assured and his assigns are interested, but the beneficiary is not. So far as the assured is concerned, the endow-

ment feature is the accumulating, by depositing with the company the annual premiums, of a sum to be paid to him in his lifetime if he survives the endowment period. * * *

"It is, I think, apparent that such a policy may have no surrender value, and yet have a very large actual value, which can be secured to the bankrupt's creditors without in any manner affecting the contingent interest which it was contemplated should be secured to the beneficiaries. There would seem to be no reason why the deposits in a life insurance company to secure a sum payable to the assured at a given date, if he should be then alive, should be treated differently from a similar contract with a savings bank or building association."

In *In re* Willing, 113 Fed. 194, the Court, referring to deferred dividend policies, said:

"By the terms of the policy he was entitled to receive at the end of the tontine period the cash payment stipulated in the contract. That is a vested contract right, contingent only upon his surviving the tontine period. The right is valuable, increasing in value with each successive payment of premium. The policy, technically, had not a 'surrender value,' within the meaning of the proviso; but it had an actual value, and that valuable right was right of property existing in the bankrupt. * * *

"The contract in question gives to the bankrupt the right to receive at a certain date a specified sum of money, contingent upon his surviving to that date. This is a vested right of property existing in the bankrupt, which passes to the trustee."

See also the cases of Patridge v. Andrews, 191 Fed. 328, Mutual Life Insurance Company v. Smith, 184 Fed. 2; *In re* Churchill, 198 Fed. 712.

The bankruptcy courts have not encountered any insurmountable difficulties in determining the value of deferred dividend and endowment insurance policies passing to the trustee.

The authorities do not support the statement made on page 7 of petitioner's brief:

> "It was the purpose of the Bankruptcy Act to give the full value of the policy to creditors and the cash surrender value was specified as the equivalent of the full value."

On the other hand, the authorities herein cited show the contrary.

II.

The probability of the respondent dying before the maturity of the policies did not make them have only a speculative value March 1, 1913.

The sole argument made by the petitioner against the method of the District Court in determining value March 1, 1913, is that the probability of respondent living to the maturity of the policies was contingent and this gave to them only a speculative value March 1, 1913, and no market value.

Life is as certain as death and the probability of the respondent dying between March 1, 1913, and May, 1919, were remote. According to the life tables, he would have lived many years after 1919.

Thousands of cases are tried in the courts of the United States every year seeking to recover damages for death and in almost every one of them the measure of damages is determined by the expected life of the deceased, based on his earning capacity. Present worth of curtesy and dower is being found in hundreds of courts always based on the expected life of the persons interested. Present worth of annuities is often determined in courts, and in income and inheritance tax cases. The whole principle of life insurance is based on the certainty of life, which certainty takes such contracts out of the field of hazard and places them on substantially the same basis as ordinary contracts. No healthy individual would sell an annuity on a ten-year purchase, unless in dire extremity, not in fear of death.

The Treasury Department has used life tables in determining the present value of contingent remainder interest on the sale of real estate. In I. T. 2076, C. B. III-2, in pointing out the method for determining the value of a life estate, the Income Tax Unit, said:

> "The value of B's life estate for the purpose of computing gain or loss from its sale should be ascertained by the following tests:
>
> (1) An annuity based upon income at the rate of 4 percent per annum of the value of the fee on the date of his acquisition of the life estate in 190— should be computed. For this purpose Table A, appearing on page 18 of Regulations 63, revised, should be used to determine the then worth of $1 payable at the end of each year during the life of the taxpayer, which multiplied by the amount

> which is shown to be the annual income based upon a 4 percent return as hereinbefore stated will give the value of the taxpayer's life estate at the date of acquisition."

The Board of Tax Appeals also followed the same method in valuing a life annuity in the appeal of John C. Moore Corporation, 3 B. T. A. 430. In the case of Simpson, *et al.*, v. United States, 252 U. S. 547, this Court, in pointing out the method to be used in valuing a contingent remainder interest, said:

> "The objection is not to the particular table that was used but to the use of any such table at all—to the method. Such tables, indeed the precise table which was made the basis of the one used by the collector, had been resorted to for many years prior to 1889 by courts, Legislatures, and insurance companies for the purpose of determining the present value of future contingent interests in property, and we take judicial notice of the fact that at the time this tax was collected 4 percent was very generally assumed to be the fair value or earning power of money safely invested. Both the method and the rate adopted in this case have been assumed by this court, without discussion, as proper in computing the amount of taxes to be collected under this War Revenue Act."

The universal method to determine the present value of contingent and vested life estates is to assume that the persons involved will live their expectancy according to the mortuary tables and reduce the capital sum to its present worth at the period of expected receipt.

Grove versus Youell, 110 Mich. 285, 33 L. R. A. 519, 137 A. L. R. 663; Jordan versus Benwood, 42 W. V. A. 312, 36 L. R. A. 519.

CONCLUSION.

We respectfully submit that the petitioner presents no reason in his brief for a reversal of the Circuit or District Court.

All of which is respectfully submitted.

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